

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS ESCOTO,

Defendant and Appellant.

C086301

(Super. Ct. No. 14F01507)

Defendant Juan Carlos Escoto was tried and found guilty of battery for attacking a correctional officer at the prison where he was incarcerated. The jury found he personally inflicted great bodily injury (GBI) during the battery, and that he had a prior serious felony conviction, which was a strike. The trial court sentenced him to 16 years in state prison.

Defendant now contends the trial court erred in: (1) refusing to instruct the jury on the defense of accident, (2) imposing both the GBI and the prior conviction enhancements, and (3) imposing the upper term. In supplemental briefing, the parties agree that the case should be remanded for the trial court to exercise its newly granted discretion to strike the prior serious felony enhancement under Senate Bill No. 1393. We affirm the judgment but shall remand for the stated purpose.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was originally charged with aggravated assault by a prisoner by means of force likely to produce GBI (Pen. Code, § 4501, count one¹), and battery by a prisoner on a nonconfined person (§ 4501.5, count two). The information further alleged defendant personally inflicted GBI on the victim during both offenses (§ 12022.7, subd. (a)), and that he had a prior strike (§ 667, subd. (b)-(i)) and a prior serious felony conviction (§ 667, subd. (a)).

His first jury acquitted him of assault and failed to reach a unanimous verdict on the battery charge, which was then retried.

Evidence from trial

The evidence from defendant's second trial showed the following:

On November 8, 2013, Bud Rich had been a correctional officer at Folsom State Prison for six years and was assigned to the tier where defendant, a prisoner, was housed. Rich testified that the evening of November 8th, he was talking to another inmate when he was hit twice in the head from behind. He turned and saw defendant standing behind him. Defendant punched Rich two times on the left side of his face. Rich raised his arms in a defensive position, and tried to punch defendant back. In an attempt to slow

¹ Further undesignated statutory references are to the Penal Code.

defendant down, Rich grabbed his shirt and pulled it over defendant's head. Defendant continued to punch Rich in his face and upper body.

Sometime during the attack, while defendant was still punching him, Rich lost his balance and fell backwards. He pulled defendant down with him and thought he hit his head on the concrete floor during the fall. Defendant continued to hit Rich, who rolled over and covered up to protect his head with his arms, but lost consciousness.

Officer David Martinez saw defendant striking Rich with both hands; Martinez testified that Rich and defendant were standing face to face and Rich was trying to defend himself. When he reached them a few seconds later, he saw defendant punching Rich in the face and upper body area while Rich was down on the ground. Martinez ordered defendant to stop, hit him, and sprayed him with pepper spray. Defendant continued to pummel Rich until he was sprayed again and taken down by a third officer.

Officer Michael Campos testified that he too saw defendant hitting Rich while Rich tried to shield himself. Campos ran down to the second tier and saw the third officer take defendant down; then he attended to Rich, who was groaning and nonresponsive face down on the floor and took him to the prison infirmary.

A nurse at the infirmary documented Rich's injuries. He told her that he was talking to inmates and someone hit him from behind. She observed bruising, abrasions, scratches, and actively bleeding wounds on Rich and in his mouth. Photographs of Rich's injuries were shown to the jury.

Rich was taken to the hospital where he was diagnosed with a broken bone in his face near his nose, a separated shoulder, and a traumatic brain injury and concussion. He had multiple surgeries after the incident, including shoulder surgery, nasal surgery, jaw surgery, and ulnar nerve surgery.

Defendant testified in his own defense; he claimed that Rich repeatedly searched his cell, and he believed Rich might be trying to set him up by planting contraband. On the evening of the attack, defendant approached Rich and asked to speak to him about the

searches. They traded words, and then Rich called defendant “you little mother f’er” and grabbed him by his shirt, pulling defendant towards him. Defendant tried to pull away from Rich. As he did so, his shirt went over his head. Rich punched defendant on the top of his head several times. Defendant hit Rich back in self-defense, and they began to exchange blows to the upper body and face.

During the struggle, Rich lost his balance and grabbed defendant with two hands, pulling them both to the ground where Rich hit his head on the floor. The two continued to try to punch each other and then someone pepper sprayed defendant and handcuffed him.

On cross-examination, defendant conceded that he never complained to Rich’s supervisors about the number of cell searches nor did he file a complaint with the warden. He claimed that the three officers who testified to seeing defendant standing over Rich hitting him while Rich was on his knees or falling were all mistaken. He admitted that he was unscathed after the fight.

Jury Instruction on Accident

At the jury instruction conference, defense counsel requested that the trial court instruct the jury with CALCRIM No. 3404, the pattern jury instruction on accident. Although the accident instruction was given in the first trial, the court found insufficient evidence to support the instruction in the second trial. The court therefore denied the request over defense counsel’s objection.

Closing Arguments and Verdicts

In closing, the prosecutor argued that regarding the battery charge, the main issue was whether defendant acted in self-defense. Regarding the GBI enhancement, the prosecutor emphasized that defendant did not have to specifically intend to inflict GBI, merely to take the actions that caused it.

Defense counsel repeatedly characterized the critical issue as “who started the fight.” Counsel emphasized that the jury had to determine the initial aggressor, and argued that defendant was acting in self-defense. Counsel conceded, however, that if defendant hit Rich first, he was “not acting in self-defense.”

The jury found defendant guilty of battery and found the GBI enhancement and the prior conviction allegation true.

Sentencing

Prior to sentencing, defense counsel submitted a statement in mitigation, highlighting defendant’s mental health issues at the time of the offense. At the sentencing hearing, counsel expressly asked that the trial court impose the low term because defendant’s mental illness was a factor in mitigation, citing several psychological evaluations of defendant before trial that found he suffered from a mental illness. Although the court acknowledged defendant had mental health problems, the court found those issues did not result in the unprovoked assault on Rich and that defendant’s mental illness was not a mitigating factor. The court found four separate aggravating factors, which we recite in more detail *post*.

The trial court sentenced defendant to an aggregate term of 16 years in prison, including the upper term of four years for count two, doubled to eight years for the strike prior (§§ 667, subds. (b)-(i), 1170.12), plus five years for the prior serious felony conviction (§ 667, subd. (a)) and three years for the GBI enhancement (§ 12022.7, subd. (a)), both consecutive. Defendant timely appealed.

DISCUSSION

I

Accident Instruction

Defendant first contends the trial court erred in refusing his request to instruct the jury on the defense of accident because sufficient evidence supported the instruction. He specifically argues, with respect to the GBI enhancement, that there was sufficient

evidence to raise a reasonable doubt as to whether he personally inflicted the injuries Rich suffered or whether they resulted from an accidental fall.

A. *The Law*

A person who commits a prohibited act “ ‘through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence’ ” has not committed a crime. (§ 26; *People v. Kim* (2011) 193 Cal.App.4th 836, 846.) The so-called “defense” of accident is merely a claim that the prosecution has failed to prove the required intent. (See *People v. Jennings* (2010) 50 Cal.4th 616, 674 [the claim that a homicide was committed through misfortune or accident amounts to a claim that the defendant acted without forming the mental state necessary to make his actions a crime].)

A trial court must give a requested pinpoint instruction only if substantial evidence supports it. (*People v. Ward* (2005) 36 Cal.4th 186, 214-215.) “ ‘In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether “there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt” ’ ” (*People v. Mentch* (2008) 45 Cal.4th 274, 288.) On appeal, we review whether the requested instruction was supported by evidence that, if believed by a rational jury, would have raised a reasonable doubt as to any intent element required for the charged offense.

B. *Analysis*

As relevant here, to prove defendant guilty of battery the prosecution had to establish that defendant willfully touched Rich in a harmful or offensive manner and that defendant did not act in self-defense. (§ 4501.5; CALCRIM No. 2723.) Defendant willfully touched Rich if he did it “willingly or on purpose”; no intent to break the law or hurt Rich is required. (CALCRIM No. 2723.) The slightest touching may constitute a battery if done in a rude or angry way; it need not cause pain or injury of any kind. (*People v. Shockley* (2013) 58 Cal.4th 400, 404 [“ ‘[i]t has long been established that “the least touching” may constitute battery. In other words, force against the person is

enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark’ ”]; CALCRIM No. 2723.)

To prove GBI, the prosecution had to establish that defendant personally inflicted a significant or substantial injury. (CALCRIM No. 3160.) “To ‘personally inflict’ an injury is to directly cause an injury, not just to proximately cause it.” (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347; see also *People v. Cole* (1982) 31 Cal.3d 568, 571-572 [the defendant, who blocked the victim’s escape and directed his accomplice to attack her, did not “personally inflict” injury as required by the section 12022.7 enhancement as he did not perform the act that directly inflicted the injury].)

Section 12022.7, subdivision (a) does not require a showing of *separate* intent to inflict GBI. (*People v. Poroj* (2010) 190 Cal.App.4th 165, 168.) Thus, the only intent required to support a GBI enhancement under that section is the intent required to commit the underlying felony. (*Ibid.*; *People v. Elder* (2014) 227 Cal.App.4th 411, 420 [noting that the “ ‘1995 amendment to section 12022.7 deleted the requirement that the defendant act “with the intent to inflict the injury” ’ ”].)

Here, this point is key because *no* evidence showed that defendant struck Rich accidentally. Instead, even defendant testified he *intentionally* struck Rich, albeit in self-defense, and that during the ensuing struggle they fell to the ground. Rich testified that defendant struck him in the head, face, and upper body, and that during the altercation they fell to the ground. Thus under either scenario, no evidence showed that defendant *accidentally* touched Rich, regardless of the theory behind the *reason* for the intentional strikes. Because the prosecutor did not have to prove that defendant intended to inflict GBI, but only that defendant intended to commit the underlying battery (*People v. Poroj, supra*, 190 Cal.App.4th at p. 168), the trial court properly concluded substantial evidence did not support an accident instruction.

Defendant’s claim that had the jury been instructed “on accident,” it could have parsed Rich’s injuries and found defendant not guilty of personally inflicting GBI for

those injuries sustained during the fall is likewise without merit. The evidence showed that defendant's intentional acts of hitting Rich and struggling with him was the direct cause of the fall, and, thus, the direct cause of all of the injuries Rich suffered. (*People v. Elder, supra*, 227 Cal.App.4th at pp. 415, fn. 3 & 420-421 [fact that the victim grabbed the defendant as he struggled to get away does not absolve the defendant from responsibility for the injury he caused (a dislocated finger) by the volitional act of struggling and attempting to pull away]; *People v. Guzman* (2000) 77 Cal.App.4th 761, 764 [GBI enhancement applied despite accidental nature of defendant's passenger's injuries suffered in car accident he caused by turning in front of oncoming traffic].) As defense counsel argued, the altercation, including the punching and falling, was one continuous act. Defendant's admitted intent to batter Rich, no matter his expressed justification therefor, was sufficient to render any claim of accident in the legal sense completely unsupported by the evidence.

The trial court justifiably concluded that insufficient evidence supported an accident instruction and properly denied defendant's requested pinpoint instruction.

II

Sentencing on the Enhancements

Defendant next contends the trial court erred by enhancing his sentence under both section 12022.7, subdivision (a) for inflicting GBI, and section 667, subdivision (a) for committing a serious felony with a prior. He argues that because the battery morphed into a serious felony *solely* because he inflicted GBI, section 1170.1, subdivision (g) prohibits imposition of both enhancements here. That section provides in relevant part that: "When two or more enhancements may be imposed for the infliction of [GBI] on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense" (§ 1170.1, subd. (g).)

As defendant concedes, this court disagreed with his position in *People v. Wilson* (2016) 5 Cal.App.5th 561. In rejecting the same argument defendant raises here, *Wilson* concluded, based on statutory language and legislative history, that section 1170.1, subdivision (g) “does not apply to a recidivist enhancement because such an enhancement does not implicate multiple punishment for a defendant’s act of inflicting great bodily harm.” (*Wilson*, at p. 567.) Unlike section 12022.7, subdivision (a), which punished defendant for inflicting GBI on Rich, section 667, subdivision (a) does not punish defendant for inflicting GBI, or for *any* aspect of the present felony, but rather for his status as a repeat offender of serious felonies. (Compare *People v. Rodriguez* (2009) 47 Cal.4th 501, 509 [the defendant’s *act of using a firearm* was improperly punished under two different sentence enhancements--section 12022.5, subdivision (a) for personal use of a firearm, and section 186.22, subdivision (b)(1)(C) for committing a violent felony (by personal use of a firearm) to benefit a criminal street gang].)

We continue to agree with our holding in *Wilson* and therefore reject defendant’s challenge to his sentencing on both enhancements.

III

Upper Term Sentence

Defendant lastly contends the trial court abused its discretion in imposing the upper term for battery because it failed to consider his mental illness as a relevant mitigating factor. He adds that the other aggravating factors found by the court did not warrant imposition of the upper term.

A. The Law

A trial court’s sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) “The trial court’s sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’ ” (*Ibid.*)

The trial court may rely on any aggravating circumstances reasonably related to its sentencing decision (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 848; Cal. Rules of Court, rule 4.420)² and need not explain its reasons for rejecting alleged mitigating circumstances, which includes a defendant's mental condition. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317.) Unless the record affirmatively indicates otherwise, the court is deemed to have considered all relevant criteria including any mitigating factors. (*Id.* at pp. 1317-1318; rule 4.409 ["Relevant factors enumerated in these rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise"].) The court may base an upper term sentence upon any aggravating circumstances it deems significant (*Sandoval*, at p. 848), and a single factor in aggravation is sufficient support for imposition of the upper term (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413).

B. Background

Defense counsel submitted a sentencing memorandum requesting the low term that specifically asked the court to consider as a circumstance in mitigation that defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime. (Rule 4.423(b)(2).) Counsel referenced several pretrial psychological evaluations that considered defendant's competency and his previous not guilty by reason of insanity plea. The psychological evaluations generally noted he suffered from schizophrenia, delusions, depression, paranoia, and impulsivity.

At sentencing, the trial court stated it had read and considered defendant's sentencing memorandum and the probation report. Although the report did not list defendant's mental condition as a mitigating factor under rule 4.423, it did note that

² Further rule references are to the California Rules of Court.

defendant reported he had been diagnosed with schizophrenia as a teen, and that he believed he had a psychotic episode when he committed the prior false imprisonment by violence with a firearm offense in Los Angeles.

During the sentencing hearing, defense counsel argued that defendant's mental illness should be considered a mitigating factor justifying imposition of the low term. The prosecutor pointed out that while defendant claimed he was suffering from a psychotic episode because of his schizophrenia regarding his prior conviction, he made no such claim here. Instead he simply claimed self-defense. The probation report listed four circumstances in aggravation, including that the crimes involved great violence and acts disclosing a high degree of cruelty, viciousness, and callousness, that the victim was particularly vulnerable, that defendant engaged in violent conduct which indicated a serious societal danger, and that defendant's prior adult convictions and sustained petitions in juvenile delinquency proceedings were numerous. (Rule 4.421.)

The trial court found the aggravating factors outweighed any mitigating circumstances and imposed the upper term. In doing so, the court noted the crime involved great violence, cruelty, viciousness, and callousness, especially since defendant continued to assault Rich after he was unable to fight back. The court also found that Rich was particularly vulnerable given the environment he worked in and the danger that he faced every day, that defendant engaged in violent conduct which was a serious danger to society, and that his prior convictions and sustained delinquency proceedings were numerous.

Regarding defendant's mental illness, the trial court stated that no evidence during trial showed that a mental health issue precipitated the assault in any way. Instead, defendant testified that *he* was the actual victim and was simply protecting himself. The court thus found that defendant's mental health issues were not a mitigating circumstance.

C. Analysis

We agree that the circumstances of the crime did not suggest that defendant's actions were the result of mental illness, particularly given that he claimed self-defense. Thus, the trial court could have reasonably concluded that defendant's mental illness did not mitigate the battery on Rich, which the evidence suggested served as revenge against Rich for repeatedly searching defendant's cell. The court's disagreement with defense counsel on this point does not show that the court improperly "establish[ed] its own standard" for applying mitigating factors, as defendant now claims.

The trial court expressly acknowledged that defendant had suffered from mental health issues throughout his life. Defense counsel summarized the evaluations in his statement in mitigation, which the court read and considered, including that defendant was schizophrenic and suffered from thought disorders, delusions, depression, paranoia, and impulsivity. The court did not abuse its broad discretion when it declined to find these issues sufficiently mitigating to warrant leniency in this case, particularly in the presence of numerous aggravating factors.

Defendant also claims that the identified aggravating factors were insufficient to support the upper term. As we have explained in detail *ante*, the probation report recommended and the trial court found four separate aggravating factors supporting the decision to sentence defendant to the upper term. Defendant selectively argues facts like his smaller size relative to Rich that weigh against the findings but ignores the evidence showing his attack on Rich was relentless and by surprise. He argues the trial court erred by finding he had "numerous" prior convictions but ignores that he had three. In any event, even if the court should not have considered one or more of the four factors in aggravation, only one was required to justify an upper term sentence. (*People v. Quintanilla, supra*, 170 Cal.App.4th at p. 413.) We see no prejudicial error.

IV

Senate Bill No. 1393

Defendant filed a supplemental brief contending that Senate Bill No. 1393 (2017-2018 Reg. Sess.) applies retroactively to his case. The People properly concede the matter.

The Governor signed Senate Bill No. 1393, which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the pre-2019 versions of these statutes, the court was required to impose a five-year consecutive term for “any person convicted of a serious felony who previously has been convicted of a serious felony” (§ 667, subd. (a)), and the court had no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (§ 1385, subd. (b).)

The statutory changes of Senate Bill No. 1393 apply retroactively to any case that is not final on January 1, 2019, under the rule of *In re Estrada* (1965) 63 Cal.2d 740. “The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.” (*People v. Conley* (2016) 63 Cal.4th 646, 657.)

The same inference of retroactivity applies when an amendment ameliorates the possible punishment. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) When a statutory amendment “ ‘vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,’ ” there is “an inference that the Legislature intended retroactive application ‘because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.’ ” (*Ibid.*, quoting *People v. Francis* (1969) 71 Cal.2d 66, 76.)

Under the *Estrada* rule, as applied in *Francis* and *Lara*, we infer as a matter of statutory construction, that the Legislature intended Senate Bill No.1393 to apply to all cases not yet final on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Accordingly, we remand the matter to the trial court for the limited purpose of the exercise of its discretion as to whether to strike the five-year enhancement.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of the exercise of discretion regarding the section 667, subdivision (a) enhancement.

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Renner, J.